



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Universal Hydraulics, Inc.

File: B-232144

Date: October 31, 1988

DIGEST

Contracting officer's decision not to procure required product through a small business set-aside, even though the requirement previously was acquired by set-aside, was not an abuse of discretion where the contracting officer determined, based upon the history of prior procurements, the advice from the agency's small business specialist and agency technical personnel, and an informal market survey, that there was no reasonable expectation that bids from two responsible small business concerns would be received.

DECISION

Universal Hydraulics, Inc., protests the decision of the Army not to set aside for small business concerns invitation for bids (IFB) No. DAAE07-88-B-A310, issued by the Army Tank-Automotive Command, Warren, Michigan, to procure armored vehicle launcher kits and spare parts.^{1/}

We deny the protest.

Universal Hydraulics argues that the procurement should be set aside for small business concerns since the Army has previously procured this requirement from such firms. In this regard, the protester asserts that there are at least two small business firms that could have been expected to respond and which can supply equipment and parts that will

^{1/} The protester previously filed an agency-level protest which the agency denied. The agency then opened bids. Universal's bid was eighth low of nine bids and fifth low of the six small business bidders. The Army advises that the apparent low bidder, a small business, has been found non-responsible and been denied a certificate of competency by the Small Business Administration.

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meet the agency's needs. Universal states that two small business firms have been awarded contracts under previous solicitations. Thus, Universal contends that there is sufficient small business competition to justify a set-aside.

Federal Acquisition Regulation (FAR) § 19.501(g) provides that once a product has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside. The Department of Defense regulations so require. Defense Federal Acquisition Regulation Supplement, § 19.501(g) (DAC 86-15). The Army did not set the protested solicitation aside, however, pursuant to an exception in the regulation for the situation where the contracting officer does not have a reasonable expectation that offers will be obtained from at least two responsible small business concerns offering the products of two different small business concerns, and that an award will be made at a reasonable price.

The Army states that it had ample reasons to open the competition based upon the prior history of similar procurements, the information obtained through an informal market survey and the advice from the agency's small business specialist and technical personnel that there was no reasonable expectation of receiving bids from at least two responsible small business concerns. The Army advises that prior history of similar procurements reveals that small business participation was generally low and lessened with each procurement. The Army reports that only two small business concerns responded to the last solicitation for this requirement, and that Universal was awarded that contract after the apparent low bidder, Capital Engineering, was temporarily suspended from contracting with the government. Further, the Army states that although its suspension was lifted prior to this contract which permitted Capital Engineering to submit a bid for the present procurement, the firm was still under criminal investigation when the present solicitation was prepared and that the firm's responsibility was questionable due to performance problems that existed under a previous contract with that firm for a similar product.

The agency further reports that, with regard to Universal, there were performance problems under the firm's previous contract, which resulted in substantial costs to both parties, and that the contracting officer questioned whether the previous small business set-aside procurement was in

fact "successful," which is required under FAR § 19.501(g) as a condition for conducting a repetitive small business set-aside. The issue of liability for these performance problems is still unresolved. While recognizing Universal's efforts to remedy past delinquency and performance problems, the agency contends that Universal's past delinquency in meeting contract deadlines and its performance problems have raised some question as to Universal's capability to adequately perform the present requirement.

Also, the Army reports that, before the solicitation was issued, the Army conducted an informal market survey of several industrial and quality assurance specialists, and discussed the issue with the contracting specialist responsible for the acquisition of this product over the last few years and the Small Business Administration procurement center representative. Based upon their knowledge of the market and their procurement and technical experience, these specialists recommended that this solicitation be issued on an unrestricted basis since two responsible small business bids could not reasonably be expected to be submitted.

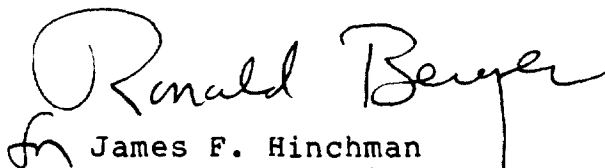
The agency also points out its attempts to increase small business interest and participation in this procurement, but states that some of the small businesses contacted expressed interest only in subcontracts for the requirement. The agency's concern regarding inadequate competition under a small business set-aside was increased because of the solicitation's complex requirements and the recent amendments to the Small Business Act which require that a small business, to be eligible for an award of a supply contract that is set aside for small business, must perform work for at least 50 percent of the cost of manufacturing the supplies, not including the costs of materials. See 15 U.S.C. § 644(o)(1)(B) (Supp. IV 1986). Based on this record, the contracting officer thus concluded that a small business set-aside was inappropriate, a decision concurred in by the SBA representative. See FAR § 19.506(a) (FAC 84-19).

The determination as to whether two responsible small business concerns reasonably may be expected to compete is essentially a business judgment within the broad discretion of the contracting officer which we will not disturb, absent a clear showing of abuse of discretion. See The Quality Inn Midtown, B-219312.3, B-221231, Apr. 4, 1986, 86-1 CPD ¶ 324. Here, the protester has not made the necessary showing that the contracting officer abused his discretion.

The record indicates that the agency had sufficient grounds to decide not to set aside this requirement. The record shows that the prior procurement history indicated decreasing small business competition in the face of agency efforts to solicit increased competition, that both Universal and Capital had prior performance problems, that Capital had been previously suspended from contracting and is the subject of an ongoing criminal investigation, and that the work requires specialized manufacturing and tooling processes which make start-up costs high. Also, the Army conducted an informal market study indicating some firms were interested only in subcontracting to a bidder, not in bidding themselves.^{2/}

As to Universal's contention that since several small business concerns did in fact submit bids in response to the solicitation, the agency improperly solicited this requirement on an unrestricted basis, we note that the number of small business bidders responding to an IFB does not affect the propriety of the initial decision whether or not to set the procurement aside. See Hopkinsville Aggregate Co., B-227830, June 16, 1987, 87-1 CPD ¶ 600. Accordingly, we find no basis to conclude that the contracting officer's judgment not to set aside was an abuse of discretion. We do expect, however, that the agency will consider the small business participation in this procurement in determining whether future similar requirements should be restricted.

The protest is denied.


for James F. Hinchman
General Counsel

^{2/} Universal claims that Capital has received a contract for one part contained in the kit subsequent to its suspension. Thus, Universal argues that the contracting officer here could not conclude that Capital is unqualified for this IFB. However, we think the contracting officer could make a business judgment that Capital could not meet the more varied and complex contract requirements of this IFB.